

Intellectual Property Rights Protection in China

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I. Introduction

According to the office of the United States Trade Representative (USTR), theft of intellectual property is a major problem in China. Copyright piracy alone is estimated at between \$2.5 billion and \$3.8 billion a year and infringement levels in virtually all categories of intellectual property (IP) were 90 percent or higher in 2004¹.

Intellectual property usually includes patents, copyright and trademarks. According to the Oxford Desk Dictionary and Thesaurus, patent is defined as an official document conferring a right or title, especially the sole right to make, use, or sell some invention. Patents are provided for a specified period, after which the use of and rights over the product or technology become part of the public domain. Patent protection is considered critical for generating returns to basic invention in pharmaceuticals, agricultural and industrial, chemicals and biotechnology.

Copyright is the exclusive legal right to print, publish, perform or record material. It protects a literary or artistic work against unauthorized duplication, performance, recording, broadcast, translation or adaptation. The goal of copyright protection and patent is to establish and maintain incentives for creation of literary works, which provides social, cultural and economic benefits to society.

Trademark is a device, a word or words secured by law or custom as representing a product, a company or service. Trademarks convey information on product quality, create incentives for trademark companies to maintain their quality standards.

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¹ James F Paradise. The Intellectual Property Conundrum in China (Asia Media, November 2005) – <http://www.asiamedia.ucla.edu/article.asp?parentid=34148>

According to Mertha², “Intellectual property refers to the protection of intangible assets for a specified period of time in order to induce and reward innovation and creativity while at the same time allowing the public to enjoy the benefits of this innovative and creative behavior.

Convention and international agreements have been developed to protect intellectual property. The Berne convention for the protection of literary and artistic works was first adopted in Switzerland in 1886. This led to the creation of the United International Bureau for the Protection of Intellectual Property, which became in 1967 the World Intellectual Property Organization (WIPO). As of April 2007, 163 countries are parties to the Berne Convention. All members of the World Trade Organization are required to accept almost all of the conditions of the Berne Convention because of the Trade related intellectual Properties agreement (TRIPS).

The People’s Republic of China (PRC) became a member of WIPO in 1980. It modeled its intellectual property rights (IPR) on the Berne convention for the protection of literary and artistic works and the agreement on TRIPS³⁻⁴. In 1984, it acceded to the Paris convention for the protection of industrial property and in 1989 to the Madrid agreement for the international registration of trademarks.

Despite its accession to the major international conventions on protection of IPRs, violation is common and it has attracted criticism from foreign investors and their governments, particularly the United States of America. To better understand the current situation on IPR protection in China, there is a need to study the development process of intellectual property laws and its enforcement in China.

II. China Intellectual Property legal framework

1. Patent Protection

In November 1973, the Chinese government decided the establishment of a patent system following the attendance for the first time of an international conference related to IPR by

² Andrew C. Mertha. The politics of Piracy: Intellectual Property in Contemporary China (Cornell University Press 2005), p24

³ Intellectual Property in the People’s Republic of China – Wikipedia, the free encyclopedia – http://en.wikipedia.org/wiki/Intellectual_property_in_the_People's_Republic_of_China

⁴ Agreement on Trade-Related Aspects of Intellectual property Rights – http://www.wto.org/english/docs_e/legal

Chinese representatives. China's reform leadership also realized that the country had fallen behind in terms of scientific knowledge and technological expertise and recognized that a viable patent regime was essential to attracting technology transfers from abroad as well as fostering China's own domestic scientific and technical development. According to Mertha⁵, the notion of intellectual property was inconsistent with both the basic assumptions of socialism and those embraced by developing states. Some officials were reluctant to the establishment of the patent regime because of the traditional socialist view that patents represented an economy and a society governed by private ownership and specifically that the monopoly rights granted to the patent holder were in opposition to socialist norms of ownership and production. There was also argument against establishing a formal patent regime simply because the patent system would only serve the inventions of foreigners since the level of science and technology in China was low.

There was also an admission that copying foreign technologies has been an important component of China's development.

Officials who were supportive of a patent regime argued that copying was not an appropriate method of developing China's economy, instead it was necessary for China to undertake its own innovative activities and therefore to advance China's own scientific knowledge base.

The patent law went through several drafts before being adopted in March 1984. The dissemination of the law and the establishment of an effective patent infrastructure were placed within the Patent Bureau. However, according to Mertha⁶, the development process of the patent law and its associated bureaucracy, the China Patent Bureau, was the essence of the current weakness of the State Intellectual property system. In early 1980, the patent bureau was managed by the State Science and Technology Commission (SSTC) because of the strong association at that time between patents and China's scientific and technological development. Two years later, the patent bureau was moved from the SSTC to the State Economics Commission (SEC), which had binding leadership authority relations over the Patent Bureau. The same year the Patent bureau was named the China Patent Bureau ("Zhongguo zhuanli ju") and it was removed from

⁵ Mertha, *op. cit.*, 79

⁶ *Ibid.*, 87-117

the SEC to be placed under the State Council. In the space of thirteen years, the Patent bureau was transferred from the SSTC to the SEC to the SSTC to the State Council. Therefore, the China Patent Bureau remained powerless and politically weak. The bureau, which will later become the State Intellectual Property Office (SIPO), has been unable to develop the power needed to compete with or issue binding orders to related agencies. The political weakness at provincial level was even more evident. Provincial level patent management offices (“zhuanli guanli chu”) had an educational function and served as a regional clearinghouse for local inventors and administrative arena for the mediation of patent related disputes. Much of their work focused on propaganda to educate the public about the new patent law and to motivate inventors to patent their inventions.

Patent bureau apparently did not have their own formal enforcement teams and relied on the assistance of the local administration of Industry and Commerce to embark on periodic campaigns against illegal patent related activities. In addition to the lack of dedicated enforcement staff, there was variation in the political power and administrative effectiveness of individual provincial level patent bureaus. Some were strong and others extremely weak leading to variation of patent protection and enforcement from region to region.

In an attempt to ensure effective protection and to reduce infringement of intellectual property, the State council established a Working Conference on Intellectual Property Rights (“Zhishi Chanquan bangong huiyi”), a national coordinating agency directly under the State Council. It was established to bridge the gaps in regular communication and to resolve misunderstandings among the bureaucracies that have a functional relationship.

The Intellectual Property Rights Working Conference (IPRWC) gained strength with the resumption in 1994 of the Sino-US IPR talks led by the Ministry of Trade and Economic Cooperation (MOFTEC). The same year, the SSTC replicated the IPRWC at the local level including municipalities and some counties. SSTC, through its agents the national IPRWC would coordinate the enforcement plan and then pass it to the local levels through the local IPRWC and its own IPR working Office (IPRWO).

Similar to patent bureau, the IPRWC/IPRWO system was also affected by informal power relations. At the national level, the power of IPRWO was concentrated in the personal

relationship between the director and the SSTC state councilor. The IPRWO that was supposed to follow-up and implement the IPRWC directives lacked the formal power to issue binding orders to its members units. Power was based on personal authority and not on the formal authority of the IPRWO as an institution.

Overall, institutional fragmentation, informal power relations and pressure from the US have shaped the Chinese Patent Bureau: a technically proficient but relatively weak bureaucratic agency. However, IPR is improving in China. A revision of the patent law was initiated in 2006 and should be completed in 2008. Reforms in Patent enforcement focused on training and certification programs for patent officials and regulators⁷. In 2006 SIPO implemented training courses for patent officers, certification program for fraud prevention and a review and examination system for addressing responsibilities and penalties in criminal and administrative cases. Pfizer did win its case in Chinese court about patent infringement by a Chinese company.

2. Copyright Protection

According to Zhang⁸, the Chinese, as inventors of printing technology, began official copyright protection in 1068 when the Emperor of the North Song Dynasty issued an order forbidding reproduction of the “Nine Books” without authorization. When a publisher, Mr. Cheng of Meishan, Sichuan, printed the book “Stories of the East Capital”, “the copyright Page” mentioned “Printed by Cheng of Meishan, who applied protection from the superior, any reproduction is prohibited”⁹. However, Zhang mentioned that there was no formal legal or administrative copyright protection until the middle of 20th century¹⁰.

Apparently, the legislative process was faster for the patent law than it was for the copyright law because of a deliberate emphasis on national economic development. Chinese officials considered patents as contributing more directly to the country’s economic development than copyright. There was also a tremendous amount of resistance by some Chinese

⁷ Erin Ennis and Robert Alaimo. “China’s 2006 IPR Review” *The China Business Review*, March-April 2007, 16-18

⁸ Fan Zhang, Dennis Xie. Chinese Copyright Protection Has Storied History, Strong Future. WWW.sourcetrax.com/docs/whitepaper-China_Intellectual_Property.pdf_1

⁹ “Evolution of Copyright System, Intellectual Property Law in China” Isinolaw Research Center, available at www.isinolaw.com

¹⁰ Zhang and Xie, *op. cit.*, 1

bureaucracies. According to Mertha, China's first copyright law was shaped by foreign pressure mostly the U.S.A¹¹. The drafting of the copyright law started in 1979 when the relations with the USA were being normalized. During a presidential visit, talks resulted in the Sino-US agreement on High Energy Physics in which the issue of mutual protection of copyright was addressed. In July 1980, the State Publications Bureau (SPA) prepared a second draft of the copyright law after the first one developed in late 1979 was considered inappropriate because it was combining both the publishing and the copyright laws. Consensus among Chinese officials was not reached with the latest draft because of concerns that if China passed the copyright law, it would be unable to harness the free flow of information that the country had enjoyed and that it would be forced to pay royalties it could not afford. Therefore, China would be inhibited in developing efficiently its science and technology capabilities.

Progress in finalizing the copyright law was slow until 1989 when the USA insisted that China establish a copyright law as a condition for renewing the U.S-China Bilateral Trade Agreement. The law was finally passed in September 1990. It took eleven years and more than six drafts to pass the first copyright law of the People's Republic of China. The law will go through series of additional improvements including software regulations and adequate protection for the copyright of Chinese people.

The biggest challenge for the copyright law is its enforcement and like the patent law, it is also subject to complex bureaucracies. The Central People's Government Publishing General administration was established in 1949 and later on, it was reorganized and put under the Minister of Culture and renamed the Ministry of Culture Publications bureau. In 1970, publications work was placed within the State Council and it was back under the minister of culture in 1982. At the same time, the National Copyright Administration was established and was moved out in 1986 from the Ministry of Culture and back to the State Council. In 2001, the publications bureau then renamed the National Press and Publications Administration was upgraded to ministry level rank. Subsequently provincial copyright bureaus were established.

Additional important changes at the legislative and policy levels took place to highlight the importance the national authorities were giving to copyright protection. The use of

¹¹ Mertha, *op. cit.*, 118-133

unauthorized software in a commercial environment was declared a civil liability and in 2002, the General Office of the State Council issued Document 47 that stipulated that if a government agency initiated an information technology project, software must account for a least 30% of the total project, which would force the purchase of legitimate software.

Despite positive development in copyright protection, the piracy rate for software remained important. According to Mertha, the majority of problems faced by the copyright bureaucracy exist at the local administrative level where the structure of the bureaucracy is extremely weak¹². The number of staff engaged in full time copyright management work is very limited with regard to the magnitude of the problem. In 2002, their number was only 200 in all of China. The copyright bureaucracy at the provincial level (Provincial Copyright bureau (PCB)) is located within the Provincial Press and Publications Bureau (PPPB or xinwen chuban ju). The office in the PPPB charged with day to day copyright management work is the copyright department (PCD or banquan chu) which is a department and therefore at lower level than the bureau.

According to Mertha, the main impediment to copyright enforcement is the National Copyright Agency (NCA) itself, which is severely understaffed and lacking a well developed network of local agencies with strong enforcement capacity¹³. Enforcement events or activities are sporadic, incapable of resolving specific problems and are not sustainable. The Press and Publications Bureau and the copyright department share the services of these enforcement teams who report only to the Bureau. The PPPB investigation teams supervise publishing houses to ensure production quality, appropriateness of content and the legitimate operation of publishing enterprises, which can include but does not necessarily consist of copyright enforcement.

As a result of limited personnel and budgetary resources, provincial copyright departments often recruit extra personnel from other administrative agencies to undertake coordinated action on a large scale.

The issue of copyright protections cannot be discussed without addressing the “Saohuang dafei” campaign aimed at sweeping away pornography and striking out against illegal

¹² Mertha, *Ibid*, 133-163

¹³ *Ibid*, 137

publications. The saohuang dafei campaigns reflect many of the problems associated with copyright enforcement in China. The principal targets are pirated publications and audiovisual goods but they are not usually regarded as copyright infringing products but rather as “reactionary” and socially disruptive commodities, which carry more severe criminal penalties. This reinforces the disinclination to use existing copyright legislation and regulations, undercutting the importance of copyright more generally. The majority of copyright infringement in China is politically neutral: Computer application software, compact disk, VCDs, etc. For apolitical and non-pornographic goods, the violators are usually fined while those violating the saohuang dafei targets are jailed or even executed.

Another area of interest for copyright protection is the culture bureaucracy, charged with supervising “the cultural market” (movies, live performance, books and periodicals, audio-visual products, crafts and fine arts, gaming establishments, restaurants, karaoke parlors and recreation centers) and with contributing to the development of related laws and regulations. Although the cultural market management bureaucracy has an extensive enforcement apparatus, its activities have only recently started to overlap in a significant way with the scope of responsibilities of the copyright bureau system. China’s opposition to US market access demands for audiovisual products has to do with maintaining social order more than economic calculations. The US trade representative and the copyright lobby regard China’s market access restrictions as a principal factor leading to the environment of piracy in China. The restrictions affect the legal importation of foreign audiovisual products and the gaps in supply are filled by the pirates who make foreign titles available at very cheap prices.

Because of severe budgetary and personnel constraints and the constant pressure from the US, China’s copyright bureaucracy has responded by accepting assistance by forging relationships with non governmental agencies and actors that assist with information gathering which helps reduce the costs of enforcement. Local groups created the Anti-Piracy alliance (fan daoban lianmeng) made of domestic software producers, retailers and publishing houses. In addition, some foreign associations established a presence in China to work with the National Copyright Administration and its local counterparts to improve the copyright enforcement. The international Federation of the Phonographic industry, a non-governmental trade association, established a presence in China to monitor the evolution of China’s copyright regime and to

protect the interests of its member companies operating in China. The Business Software Alliance also established operations in China as well as the Motion Picture Association of America. The acceptance of foreign actors to work more closely with local copyright administration offices was a big step forward in IPR protection in China.

In 2005, a national crack down “Hawk action” resulted in the arrest of 5,981 counterfeits. Throughout 2006, the People’s Republic of China (PRC) government undertook a series of enforcement campaigns “Operations Sunshine I, II, III” to fight audiovisual IPR violations. To reinforce IPR protection, the PRC government issued a regulation that allows authorities to impose administrative fine of up to 100,000 Yuan per copyright infringement of works disseminated over networks.

3. Trademark Protection

Trademark counterfeiting in China is considered by many IPR analysts to be the most serious counterfeiting problem in the world history. A study by the People’s Republic of China (PRC) State council Research and Development Center reported that in 2001 the PRC economy was flooded with between \$19-\$24 billion worth of counterfeit goods. In 2003, China accounted for 66% or over \$62 million of the \$94 million of all counterfeit and infringing goods seized by the US Customs Service at ports of entry into the United States¹⁴.

There are two main types of trademark violation: counterfeiting and infringement.

Counterfeit is indistinguishable from its genuine counterpart at least as far as the outside packaging is concerned. A trademark infringing good has outside packaging that is intended to confuse the consumer into thinking that it is the genuine or legitimate product.

Trademark can include the name of a product or images. Most counterfeiting and trademark infringement revolves around the actual packaging of the good.

The illegal trade in counterfeit goods and trademark infringing in China can be divided into two components: Manufacture and distribution.

¹⁴ Congressional Executive Commission on China. Counterfeiting in China and its effect on US manufacturing, April 20, 2004, Written Testimony of Professor Daniel C .K. Chow. The Ohio College of Law. <http://www.cecc.gov/pages/roundtables/051605/Chow.php>

The manufacture of counterfeits appears to be concentrated in the Southeastern region of China, mostly in Fujian and Guangdong Provinces. Both provinces were among the first areas opened to foreign investments in China and were some of the first locations for sino-foreign joint ventures. Very often, the production of trademark-violating merchandise takes place in factories that also manufacture legitimate merchandise. These factories can sell production overruns illegally or they can maximize profits by simply producing the same merchandise for the legal trademark owners and, after hours, for the counterfeiters. In most cases, the factories make legal generic merchandise that violates trademarks only when the offending mark is affixed. The delivery of counterfeit goods to retailers is done in limited quantities to avoid attracting raids by enforcement agencies and therefore a greater financial loss and administrative penalty.

It appears that criminal organizations based in Hong Kong and Taiwan often provide the financing for the underground factories that manufacture illegal counterfeits in Guangdong and Fujian¹⁵. The large sums of money that can be earned through counterfeiting and the small penalties as compared to those imposed for smuggling and narcotics have attracted these criminal organizations to the counterfeit trade. There is also tremendous financial incentive for peasants and migrant workers to engage in counterfeit work. In some cities like Yiwu, most of the local economy is connected to the trade of counterfeits.

The distribution of counterfeit products occurs through a series of large open air or partially enclosed wholesale markets located in densely populated area. Distribution centers according to Mertha¹⁶ are often managed by local government agencies (such as AIC) or they have quasi-private ownership but include officials such as former vice mayors or former AIC directors on their boards of directors. Local AICs invest their own funds in establishing the wholesale market and collect rent from each of the individual wholesale distributors. Once the business is in operation, AICs will also collect a management fee from each individual proprietor. In a large wholesale market, the operating revenues to the local AIC can easily exceed \$100,000 per year. The most notorious of these distribution centers is Yiwu, which enjoys an annual turnover of around 2 billion dollars a year.

¹⁵ Chow, *Ibid*

¹⁶ Mertha, *op. cit.*, 184 -190

To understand the trademark enforcement in China, it is necessary to look at the bureaucracy charged with trademark protection and anti-counterfeiting.

There has been external pressure from the U.S Trade Representative and the IPR lobby to change China's trademark legislation, mainly with regard to the scope of infringements, registration of marks, eligible right holders and territorial extension¹⁷.

Apparently, the State Administration for Industry and Commerce (SAIC) Trademark office has refused to extend a protection to foreign marks. The common argument invoked by Chinese officials is that such mark may be "well known" outside of China but not among the Chinese population. The major complaint of trademark holders has been the enforcement of the laws. The SAIC was established in August 1982 and its broad responsibilities include implementing policies, laws, Party and government directives, drawing up laws and regulations relevant to the administration of industry and commerce, supervising the economic activities of industrial and commercial enterprises, protecting legitimate enterprises and clamping down on illegal enterprises. The SAIC's responsibilities include specifically supervising the growing local market economies and ensuring that pricing and other related behavior remain legal¹⁸.

Unlike the copyright enforcement, the AIC system does not stop at provincial level: the AIC extends through the prefecture, municipal, county and urban district levels.

Two of the most relevant internal departments within the AIC system are the trademark and advertising department and the fair trade department. At all levels below the province, the trademark offices of the AIC are involved in investigation and enforcement, not registration. Local AIC units do not have the right to register trademarks. They pass trademark registration up to the national level SAIC but they do have the responsibility of enforcing trademarks. As previously stated, AICs are faced with a conflict of interest as they are charged with policing and enforcing the same markets in which AICs and local government have a substantial investment and financial interest. Closing down these wholesale markets would result in an important loss of revenue to the AIC but would also affect the economic survival of some cities like Yiwu.

¹⁷ Mertha, *Ibid*, 170

¹⁸ *Ibid*, 175

Because of this situation and the interference for a while of a competing bureaucracy, the Quality Technical Supervision Bureau (QTSB) renamed later on the State Quality Examination Supervision and Quarantine General Bureau, trademark protection and anticounterfeiting efforts were severely affected. The QTSB is primarily responsible for maintaining product quality and overall standardization but because of the inefficiency of AICs and the financial gain, it found a niche within the ongoing crackdown against counterfeit products in China.

One of the most important developments in China in the past two decades has been the increase in the amount of foreign direct investment and the associated rise in the number of foreign commercial partners or agents living and working in China. Foreign companies have been able to engage local AICs and QTSBs to step up their enforcement efforts by contributing large financial resources. Private and Chinese investigation agencies are working with enforcement agencies to undertake IPR enforcement actions. While the coordination is predominantly undertaken by the investigation firms, the actual enforcement actions can only be undertaken by the actual AIC or QTSB units¹⁹.

Trademark violation and counterfeit does also affect Chinese companies but they barely used the service of private or consulting agencies because of high cost associated with enforcement activities. The cost of a raid can include in addition to consulting fee, travel and lodging expenses, purchase of large number of samples and the cost of the trademark agent in charge of drafting the necessary complaint letter.

Foreign commercial actors in China have shaped the enforcement patterns in China by motivating the AIC and QTSB to become more active in anticounterfeiting enforcement, which provides them with many rewards, revenues from confiscated goods and fines imposed upon counterfeiters.

Local protectionism and lack of severe penalties have resulted in an enforcement system that does not deter appropriately counterfeiting. Many brand owners complain that counterfeiters and pirates are often back in business in a matter of weeks after an enforcement action has taken place. The average fine imposed on the counterfeiter or infringer in 2000 was \$794, a small

¹⁹ *Ibid.*, 199

amount compared to profits generated by counterfeit goods²⁰. This situation has led national networks and associations of IPR agents or officers to push for the criminalization of counterfeiting. The 1997-revised criminal law contains provisions for intellectual property offenses. Section 7 of the criminal Law provides sentences of up to three years in prison or hard labor and a fine for IPR-related crimes. If the value or the quantities involved are particularly important, the sentence is between three and seven years and a fine²¹.

For example under Article 140, a producer or distributor who has sales of counterfeit goods exceeding RMB 50,000 but below RMB 200,000 must be sentenced to a term of imprisonment of up to two years and must pay fines²².

Sentences of more than seven years and even the death penalty can be ordered if the economic crimes (counterfeit production and sales) result in serious injury or death of a consumer. Punishment regarding pharmaceuticals and foodstuffs are particularly severe.

Despite the magnitude of counterfeiting and piracy, the number of cases transferred by administrative authorities to the Public Security Bureau (PSB) is very low. This situation is explained by the fact that administrative authorities like the AIC and QTSB will spend time and resources in conducting enforcement activities but will be unable to collect fines from the perpetrator when the case is transferred. In addition, the AIC will also have to transfer to judicial authorities confiscated products, machinery and other evidence that might otherwise be sold at public auction with the proceeds retained by the AICs.

Foreign companies pushing for criminal penalties for counterfeiting found themselves facing opposition from the two groups, AIC and QTSB, which want to hold on to their enforcement portfolios and the PSB which does not want additional workload and responsibilities.

In 2005, China agreed to raise the number of criminal prosecutions relative to the number of administrative prosecutions. However, the IPR related cases must still meet the minimum value thresholds to be considered for criminal prosecution. US Secretary of commerce Carlos

²⁰ Chow, *op. cit*

²¹ Mertha, *op. cit*

²² Chow, *op.cit*

Gutierrez and many other US officials have considered these thresholds as a violation of China's World Trade Organization Agreement on Trade related aspects of IPR²³. In March 2006, China released an opinion that calls for the fast transfer of administrative cases to public security bureaus. In late 2006, China took another step toward fulfilling its joint Commission on Commerce and Trade (JCCT) by approving the WIPO Copyright and Performance and Phonograms treaties. Beijing agreed to verify that all computers used by government and state-owned enterprises are loaded with legal software.

4. Conclusions

One does not need to go to China to appreciate the ingenuity of Chinese people. Products made in China are familiar items not only in U.S. households and companies but also all over the world. Chinese “know how” can be appreciated not only in U.S factories, institutions and laboratories but also in the remotest areas of Africa where the Chinese government sends doctors to provide health care services and technicians to train farmers to improve crops.

One does not need to go to China to find out that a wide array of counterfeits and pirated goods originate from there. In many countries, they are familiar goods in merchants' stalls. However, one has to be in China to appreciate the magnitude of the problem but also its eventual impacts in people's lives and without doubt in the country's economy. I had the opportunity not only to observe the country's effort to harness science, technology and innovations in their science parks but also to shop in some of the numerous markets where counterfeits are displayed overtly. Counterfeits are also proposed to potential buyers in the streets or near popular hotels.

Looking at the development process of IPR in China, one can conclude that exogenous pressure specifically from the U.S has contributed to the development of IPR policies and laws in China. The U.S. government has used section 301 of the trade Act of 1974 to push China to develop IPR laws specifically requested by lobbyists and U.S. companies. Section 301 grants the United States unilateral power to punish countries considered a threat to U.S. trading interests and to enforce U.S. rights under existing bilateral trade agreements²⁴. It also extends the criteria

²³ Erin Ennis and Robert Alaimo. “China's 2006 IPR Review”. The China Business Review, March- April 2007; p16-18

²⁴ A. Lynne Puckett, William L. Reynolds. “Rules, Sanctions and Enforcement under section 301: At Odds with the WTO”? The American Journal of International Law, Vol 90, No 4 (Oct 1996) 675-689

for the granting or withholding of Generalized System of Tariff status to other countries to include intellectual property protection²⁵.

China had to sign a memorandum of understanding with the U.S. on the protection of IPR because of the penalties associated with the application of section 301 that the U.S. threatened to use.

Despite the creation of new IPR laws in China, the biggest challenge remains its enforcement by national authorities. Frequent leadership and bureaucratic changes have affected the Patent bureau's effectiveness. Local protection and restrictions have also fueled copyright violations specifically with regard to the film industry. A 2006 report stated that major U.S. motion picture industry lost \$6.1 billion in 2005 to piracy worldwide and China had the highest piracy rate of all surveyed countries: 90 percent of the potential China market was lost to piracy in 2005 resulting in a \$244 million loss for the Motion Picture Association companies alone²⁶. There is a quota limit for foreign films in China and such restrictions enable pirates, not the movie industry, to fill the demand. Apparently, film distributors are tackling pirates by converting them into legitimate retailers. They also engage in film co-productions to avoid the quota restriction. Trademark enforcement in China has suffered greatly because of local protectionism motivated by economics and financial gains. A significant proportion of the Chinese population makes a living selling counterfeits and pirated goods and local authorities generated funds by investing in wholesale markets and rentals where those goods are sold. In order to address this conflict of interest the government must develop a plan to ensure an economic stability or earnings for populations who make their living from counterfeits.

China is not the only country that produces counterfeits but there is the "know how" and the economy of scale that make companies from the U.S or the developed world very concerned about IPR protection in China.

The fight against counterfeiting and piracy in China will be a long and tough battle considering the fact that the market demand is great not only in China but also all over the world.

²⁵ Susan K. Sell. Power and Ideas: North-South Politics of Intellectual Property and Antitrust. New York Press (1998) 195

²⁶ Paula M. Miller. "Reeling in China's" Movie Fans. The China Business Review, March-April 2007, pp 35-39

Because of rising cost of living and saving concerns, many people look for the best deal they can get. They often opt for cheaper and sometimes poor quality goods or counterfeits.

It is also important to mention that Chinese counterfeiters and pirates do harm their country by holding back China's own innovators and entrepreneurs. They also do harm to China by discouraging foreign investments and technology transfers.

Recent events like the export of contaminated foods, fake drugs, toxic toothpastes and poor quality products that have motivated two recalls within a month by the American toy company, MATTEL, will create additional mistrust of China's regulatory regime²⁷. However, the Chinese government has not hesitated in some occasions to demonstrate that corruption will not be tolerated in some regulatory agencies like the Chinese State Food and Drug Administration (FDA). In fact, in July 2007, the former head of the Chinese FDA was executed for taking bribes but mostly for licensing sub-standard drugs and infant formula, which led to some fatalities²⁸.

Despite the challenges facing China on IPR issues, the government has made great improvements on IPR since its accession in 2001 to the World Trade Organization. China has also shown that it can enforce national laws it has developed without any external pressure as illustrated by the one child, illicit drug and anti-government propaganda laws.

China will need definitely to improve IPR protection by reducing local protectionism, by better coordination of IPR development and enforcement among various government levels, by working with foreign and local companies that have invested in the country to enforce IPR laws and by revising its legal and regulatory systems to ensure quality products.

²⁷ K. Graham. "Is China's growth Counterfeit?" The Motley Fool. August 6, 2007.

<http://www.fool.com/investing/international/2007/08/06/is-chinas-growth-counterfeit.aspx>

²⁸ H. Jia. "China Syndrome – A regulatory framework in meltdown". Nature Biotechnology, Volume 25, number 8, August 2007, pp 835- 837